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11 GROUPME, INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

15 BRIAN GLAUSER, individually and on behalf
of a class of similarly situated individuals,

16 Plaintiffs,

17 v.

18 TWILIO, INC., a Delaware corporation; and
19 GROUPME, INC., a Delaware corporation,

20 Defendants.
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No. 4:11-cv-02584-PJH

DEFENDANT GROUPME, INC.'S:

**(1) MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PLAINTIFF'S RULE 56(d) MOTION
FOR STAY OF BRIEFING ON OR
DENIAL, WITHOUT PREJUDICE,
OF GROUPME'S MOTION FOR
SUMMARY JUDGMENT; AND**

**(2) DECLARATIONS OF MICHAEL B.
HAZZARD, J. JONATHAN HAWK
AND BRYAN A. MERRYMAN**

Date: September 3, 2014
Time: 9:00 a.m.
Courtroom: 3

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1 **I. INTRODUCTION**

2 Plaintiff Brian Glauser (“Plaintiff”) neglected to serve discovery on non-parties Twilio,
 3 Inc. (“Twilio”) and Bandwidth.com, Inc. (“Bandwidth”) until June 27, 2014, this Court’s
 4 deadline to complete discovery regarding the autodialer issue (defined below), when he served
 5 them with document subpoenas. Twilio and Bandwidth served timely objections to the
 6 subpoenas, objecting, in part, that the requests were untimely under the Court’s scheduling order.
 7 Plaintiff now attempts to avoid the lapsed deadline by portraying his untimely subpoenas as
 8 previously outstanding discovery requests, and asks the Court for more time to complete that
 9 discovery and oppose defendant GroupMe, Inc.’s (“GroupMe”) motion for summary judgment
 10 (“MSJ”). This Court should deny Plaintiff’s motion for several reasons.

11 First, the autodialer discovery period closed on June 27, 2014, thus Plaintiff’s subpoenas
 12 to Twilio and Bandwidth were untimely. The Court, with input from counsel, set a discovery
 13 and briefing schedule for GroupMe’s MSJ on whether GroupMe used an “automatic telephone
 14 dialing system” (“autodialer”), as the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et*
 15 *seq.* (“TCPA”) defines that term, to send Plaintiff text messages. On April 28, 2014, supported
 16 by declarations from Twilio and Bandwidth, GroupMe filed its MSJ. The Court’s scheduling
 17 order gave Plaintiff 60 days from April 28, 2014, to complete discovery on the autodialer issue
 18 (June 27, 2014), and 30 more days (July 28, 2014) to file a brief opposing GroupMe’s MSJ.
 19 Plaintiff’s subpoenas served on Twilio and Bandwidth were untimely, and, therefore, did not
 20 comply with the Court’s deadline to complete autodialer discovery. Moreover, Plaintiff cannot
 21 use Federal Rule of Civil Procedure (“Rule”) 56(d), as he attempts by his motion, to reopen the
 22 discovery period, and Plaintiff has not moved under Rule 16 to modify the scheduling order.

23 Second, Plaintiff, who is represented by five attorneys of record, fails to meet his burden
 24 under Rule 56(d) to show he has been diligent seeking discovery from Twilio and Bandwidth.
 25 Plaintiff has known of Twilio’s involvement with GroupMe’s transmission of text messages for
 26 more than three years, and has known of Bandwidth’s involvement since at least April 28, 2014,
 27 when GroupMe filed its MSJ. However, Plaintiff waited until June 20, 2014, one week before
 28 the autodialer discovery cutoff, to seek information informally from Twilio. Twilio declined to

1 provide information informally, denying an agreement existed under which Twilio would
2 provide Plaintiff informal discovery. Indeed, Plaintiff's discussions with Twilio on April 21,
3 2014, confirmed no agreement existed. Plaintiff then served both Twilio and Bandwidth with
4 document subpoenas on June 27, 2014. Plaintiff never sought to depose Twilio or Bandwidth,
5 and, after receiving their objections but before filing his Rule 56(d) motion on July 28, 2014, did
6 not try to meet and confer with either third party or file a motion to compel compliance with the
7 subpoenas. Under similar facts, courts within this district, including this Court, have held parties
8 did not act diligently, as required under Rule 56(d).

9 Third, Plaintiff fails to meet his burden under Rule 56(d) to identify specific facts he
10 could obtain through discovery that would preclude summary judgment. Plaintiff fails to
11 identify any facts showing GroupMe used an autodialer or submit any evidence indicating such
12 facts exist. Rather, Plaintiff identifies a number of broad issues about which he would like to ask
13 Twilio and Bandwidth in the hope of finding something to support his case. Cases from within
14 this district demonstrate Plaintiff's showing is insufficient.

15 Finally, any continuation of the briefing schedule or additional discovery (even if limited
16 to document production by Twilio and/or Bandwidth) would be futile because GroupMe did not
17 use an autodialer. As shown in GroupMe's MSJ, equipment meets the definition of an autodialer
18 only if it can randomly or sequentially generate phone numbers. There is no alternative
19 definition for text messaging technology under the TCPA, and GroupMe's uncontroverted
20 evidence shows GroupMe's technology cannot randomly or sequentially generate phone
21 numbers. Seeking to escape this conclusion, Plaintiff advances two definitions of autodialer that
22 do not include the requirement an autodialer be able to randomly or sequentially generate
23 numbers. Plaintiff's definitions conflict directly with the plain language of the TCPA, Federal
24 Communications Commission ("FCC") regulations implementing the TCPA, FCC rulings, and
25 recent district court orders, including one from within this circuit. Moreover, Plaintiff's reliance
26 on an out of circuit district court opinion is misplaced, as that opinion was wrongly decided
27 based on the same misreading of FCC rulings Plaintiff argues here.

28 For these reasons, as discussed more fully below, GroupMe respectfully requests the

1 Court deny Plaintiff's motion.

2 **II. STATEMENT OF ISSUE**

3 1. Whether Plaintiff is entitled to an extension of the briefing schedule or denial of
4 GroupMe's MSJ under Rule 56(d).

5 **III. BACKGROUND**

6 The TCPA, as interpreted by the Ninth Circuit, prohibits using an autodialer to send an
7 unsolicited text message to a cell phone without obtaining the prior express consent of the called
8 party. 47 U.S.C. § 227(b)(1)(A)(iii); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 949 (9th
9 Cir. 2009) (interpreting the term "call" in TCPA as including text messages). The TCPA defines
10 an autodialer as equipment having "the capacity -- (A) to store or produce telephone numbers to
11 be called, using a random or sequential number generator; and (B) to dial such numbers." 47
12 U.S.C. § 227(a) (emphasis added). Plaintiff's Amended Complaint, the operative complaint,
13 alleges GroupMe and former co-defendant Twilio violated the TCPA by using an autodialer to
14 send Plaintiff unsolicited text messages. Am. Compl., Dkt. No. 34, ¶ 11 (Sept. 15, 2011).

15 **A. Procedural History**

16 On March 27, 2014, the Court held a case management conference ("CMC"), at which it
17 lifted the stay in this action entered on January 27, 2012. Order, Dkt. No. 93 (Jan. 27, 2012);
18 Declaration of Bryan A. Merryman ("Merryman Decl."), ¶¶ 2-3. The Court stated during the
19 CMC it would, at the request of GroupMe and Twilio, permit them to file an MSJ on whether
20 they used an autodialer to send Plaintiff text messages. Merryman Decl., ¶ 3. GroupMe and
21 Twilio asked for 30 days from the date of the CMC (April 28, 2014) to file the MSJ. *Id.* Plaintiff,
22 in turn, asked for 60 days from the filing of the MSJ to conduct discovery on the autodialer issue,
23 and an additional 30 days thereafter to file his opposition to the MSJ. *Id.*

24 The Court entered an order on March 27, 2014, adopting the schedule requested by the
25 parties. Civ. Mins., Dkt. No. 93 (Mar. 27, 2014). The Court's Order dated March 27, 2014, states
26 "[t]he motion re: autodialer issue shall be filed within 30 days. . . . The Court will allow up to 60
27 days to complete discovery and an additional 30 days to file the opposition brief." *Id.* The
28 Court's Order further instructs the parties to "meet and confer regarding the amount of discovery

needed and submit a stipulation as to the briefing schedule.” *Id.*

On April 21, 2014, the parties stipulated to the dismissal of Twilio without prejudice. Stipulated Dismissal of Twilio, Inc., Dkt. No. 105 (Apr. 21, 2014). Twilio had been a defendant since Plaintiff filed his complaint more than three years ago. Compl., Dkt. No. 1 (May 27, 2011).

B. GroupMe’s Summary Judgment Motion

GroupMe timely filed its MSJ on April 28, 2014. MSJ, Dkt. No. 107-1 (Apr. 28, 2014). GroupMe’s MSJ is supported by declarations from GroupMe’s co-founder Steve Martocci, GroupMe’s Director of Engineering John Pignata, Twilio’s Solutions Architect Ameer Badri, and Bandwidth’s Vice President of Voice and Messaging Service Brent Mello. *Id.*

GroupMe’s MSJ shows it offers a free social messaging service. MSJ at 3-7. On April 18, 2011, Mike L. created a group using GroupMe’s service. *Id.* at 7-8. On April 23, 2011, Mike L. provided GroupMe with Plaintiff’s name and phone number, and added him to the “Poker” group then consisting of eight people. *Id.* By adding Plaintiff to the “Poker” group, Mike L. triggered GroupMe’s software application to send Plaintiff a customized message welcoming him to the group, which message also included notifications on how to avoid potential data charges, to exit the group, and not to receive future group messages. *Id.* Plaintiff then received social messages from other group members and informational messages from GroupMe triggered solely in response to specific actions by other group members. *Id.* Plaintiff responded “In” on April 23, 2011. *Id.* After he filed this action on May 27, 2011, Plaintiff registered with GroupMe to use its service on June 23, 2011, and remains a member of the “Poker” group. *Id.* at 8.

GroupMe’s MSJ shows that, to fall within the definition of an autodialer under the TCPA, equipment must have the present capacity, at the time of use, to randomly or sequentially generate phone numbers. MSJ at 10-16. GroupMe’s software application cannot, and never has been able to, randomly or sequentially generate phone numbers. *Id.* The software applications provided by Twilio and Bandwidth as part of GroupMe’s free social messaging service cannot, and never have been able to, randomly or sequentially generate phone numbers. *Id.*

GroupMe’s MSJ anticipates Plaintiff would argue it used a “predictive dialer” to send him text messages, although Plaintiff’s Amended Complaint fails to so allege. MSJ at 16-17.

GroupMe's MSJ shows the FCC's "predictive dialer" rulings under the TCPA do not change the requirement an autodialer "randomly or sequentially generate" numbers, and, in any event, those rulings are specific to voice calls and do not apply to text messaging technology. *Id.* Further, GroupMe's technology does not constitute a "predictive dialer" because its technology can only send text messages in response to specific actions of other group members, *i.e.*, GroupMe's technology requires "human intervention" and cannot send text messages autonomously. *Id.*

Plaintiff does not submit any evidence disputing the admissible evidence filed in support of the MSJ.

C. Discovery

After GroupMe filed its MSJ on April 28, 2014, Plaintiff had 60 days to complete discovery on the autodialer issue. Civ. Mins., Dkt. No. 93. Yet, as of May 5, 2014, Plaintiff had not contacted GroupMe to discuss the amount of discovery he needed, as required by the Court's Order dated March 27, 2014. Declaration of J. Jonathan Hawk ("Hawk Decl."), ¶¶ 4-5. GroupMe's attorney contacted Plaintiff's counsel on May 5, 2014, but only one of Plaintiff's five counsel of record responded, and he was unavailable to meet and confer regarding a discovery plan or briefing schedule until May 12, 2014.¹ *Id.*, Ex. D.

When the parties met and conferred on May 12, 2014, Plaintiff requested the full 60 days to complete autodialer discovery and an additional 30 days to file his opposition to GroupMe's MSJ. Hawk Decl., ¶ 7. Plaintiff's counsel expressly stated he wanted a deadline to complete discovery on the autodialer issue of June 27, 2014. *Id.* GroupMe agreed. *Id.* The parties submitted a stipulated discovery and briefing schedule to the Court on May 15, 2014, setting, among other deadlines, June 27, 2014, as the "Deadline to complete discovery on the autodialer issue raised in GroupMe's summary judgment motion," and July 28, 2014, as Plaintiff's deadline

¹ All of Plaintiff's attorneys of record listed in this action practice at Edelson PC. Edelson, a self-professed "class action super firm," touts its national, plaintiff's side, TCPA class action practice, "with a particular emphasis on technology class actions," including numerous TCPA class actions throughout the country over the past five years. *See Pimental v. Google, Inc.*, No. 4:11-cv-02585 (N.D. Cal.), Dkt. No. 84-2, Decl. of Rafey Balabanian, Ex. A, at 7-10 (filed Oct. 5, 2012) ("We have established key precedent under the [TCPA] . . . resulting in multiple eight figure settlements in recent years. We have prosecuted over 100 cases involving mobile content, settling numerous nationwide class actions . . . collectively worth over a hundred million dollars.").

1 to file his opposition to GroupMe's MSJ. Joint Stipulation to Set Briefing Schedule and Order,
2 Dkt. No. 109 (May 16, 2014) (emphasis in original). The Court adopted the parties' stipulated
3 schedule without modification on May 16, 2014. *Id.*

4 **1. Plaintiff's Discovery from GroupMe**

5 When the parties discussed a discovery and briefing schedule on May 12, 2014, Plaintiff
6 recalled a first request for production of documents and a first set of interrogatories, to which
7 GroupMe served responses in January 2012, shortly before the Court stayed this action. Hawk
8 Decl., ¶ 8. Plaintiff asked GroupMe to serve new responses to those discovery requests on an
9 expedited basis because of the deadline of June 27, 2014, to complete autodialer discovery. *Id.*

10 GroupMe agreed to serve responses on an expedited basis to 23 requests relevant to the
11 autodialer issue. Hawk Decl., ¶¶ 16-18, Ex. E. Specifically, the parties agreed (a) to treat
12 Plaintiff's discovery requests as served on May 22, 2014, (b) GroupMe would serve on an
13 expedited basis, by Friday, June 6, 2014, written responses to 23 specific discovery requests, (c)
14 GroupMe would produce documents on a rolling basis, starting on Monday, June 9, 2014, and (d)
15 GroupMe would serve responses to the remainder of Plaintiff's discovery requests within 30 days
16 in accordance with the Federal Rules of Civil Procedure. *Id.*

17 In reaching an agreement to serve responses to autodialer discovery on an expedited basis,
18 GroupMe did not commit to completing its production of autodialer documents earlier than June
19 27, 2014. Hawk Decl., ¶ 17. GroupMe also said some information sought on the autodialer issue,
20 particularly regarding GroupMe's technology, is highly confidential and proprietary, and would
21 potentially include source code. *Id.*, ¶¶ 10, 17, 22. GroupMe told Plaintiff's counsel several
22 times it would not produce confidential documents without a protective order, which Plaintiff's
23 counsel acknowledged and never expressed disagreement with GroupMe's position. *Id.*

24 GroupMe met all deadlines set by the Court and to which the parties agreed. Hawk Decl.,
25 ¶¶ 20-22, 27-32, 37. GroupMe served on an expedited basis responses to 23 discovery requests
26 on June 6, 2014, produced documents starting on June 9, 2014, and completed its production of
27 autodialer documents (437 pages, including emails) by June 27, 2014. *Id.* GroupMe also served
28 responses to all remaining (non-autodialer) discovery requests on June 27, 2014. *Id.*

1 Seeking to expedite its production of confidential documents, GroupMe even drafted a
 2 stipulated protective order based on a form from the Northern District of California's website, and
 3 provided it to Plaintiff for review on June 4, 2014. Hawk Decl., ¶ 19. Plaintiff failed to provide
 4 any comments on the draft for almost one week, until June 10, 2014. *Id.*, ¶ 22. Plaintiff then did
 5 not respond promptly to GroupMe's inquiries regarding Plaintiff's proposed changes to the draft.
 6 *Id.*, ¶¶ 22-24, Exs. F, G. The parties stipulated to the entry of the protective order on June 18,
 7 2014, which the Court entered on June 23, 2014. The same day the Court entered the protective
 8 order, GroupMe began producing confidential documents, including its source code, system and
 9 database architecture, and agreements with Twilio and Bandwidth. *Id.*, ¶¶ 27-28.

10 Plaintiff never asked to depose GroupMe's founders or employees, including Mr.
 11 Martocci and Mr. Pignata, who submitted declarations in support of GroupMe's MSJ. Hawk
 12 Decl., ¶ 38. Plaintiff never asked to meet and confer with GroupMe regarding its discovery
 13 responses or document productions on the autodialer issue. *Id.*, ¶ 37. Plaintiff never, until now,
 14 expressed any displeasure with the substance or timing of GroupMe's discovery responses or
 15 document productions. *Id.*

16 On June 26, 2014, Plaintiff's counsel contacted GroupMe, acknowledged the deadline of
 17 June 27, 2014, to complete autodialer discovery but requested GroupMe stipulate to a four-week
 18 extension of that deadline and Plaintiff's corresponding deadline of July 28, 2014, to oppose
 19 GroupMe's MSJ. Hawk Decl., ¶ 30. Plaintiff's counsel stated he needed time to serve formal
 20 discovery requests on non-party Twilio, but did not mention Bandwidth. *Id.* GroupMe declined
 21 to stipulate to a four-week extension. *Id.*, ¶ 32. Plaintiff's counsel inquired whether GroupMe
 22 would stipulate to a shorter extension. *Id.*, ¶ 34. GroupMe responded by asking Plaintiff to
 23 provide a proposal identifying the length of the requested extension and the discovery he wanted
 24 to conduct. *Id.*, Ex. J. Plaintiff never responded. *Id.*

25 **2. Plaintiff's Informal Discovery Request to Twilio**

26 Between April 18 and 21, 2014, counsel discussed terms of a stipulation that would
 27 dismiss Twilio without prejudice. Declaration of Michael B. Hazzard ("Hazzard Decl."), ¶¶ 2-7.
 28 During those email exchanges and phone call, Plaintiff's counsel mentioned the possibility of a

1 future request that Twilio provide certain information. *Id.* Plaintiff's counsel discussed, in
 2 general terms, the types of information he might request, including, for example, information
 3 identifying computer equipment Twilio used to route text messages to Plaintiff's cell phone. *Id.*,
 4 ¶ 2, Ex. A. Plaintiff's counsel sent Twilio an email on April 18, 2014, outlining "information that
 5 we're interest[ed] in obtaining from Twilio." *Id.* Twilio told Plaintiff's counsel on April 21,
 6 2014, however, the information outlined in his email is irrelevant to this case and would be
 7 unduly burdensome to collect. *Id.*, ¶¶ 3-4. Twilio did not agree to produce such information. *Id.*,
 8 ¶ 6. Twilio told Plaintiff's counsel, at most, Twilio would be subject to third-party discovery
 9 under the Federal Rules of Civil Procedure and would work with Plaintiff in good faith in
 10 responding to any future formal discovery requests Plaintiff might serve on Twilio in this case.
 11 *Id.*, ¶¶ 2-7, Exs. A, B. On April 21, 2014, Plaintiff's counsel declined Twilio's request to discuss
 12 further the information outlined in his email, and agreed to dismiss Twilio without prejudice. *Id.*

13 Twilio never agreed to produce any materials to Plaintiff informally. Hazzard Decl., ¶ 6.
 14 Twilio never agreed to waive its right to be served with a subpoena as a third party and, in
 15 response, serve a written response, including objections. *Id.*

16 Plaintiff waited more than two months, until the week before the autodialer discovery
 17 deadline, to contact Twilio about obtaining information. Hazzard Decl., ¶¶ 8-9. On June 20,
 18 2014, Plaintiff's counsel sent an email to Twilio, purporting "to follow up with respect to Twilio
 19 gathering the few pieces of information regarding the *Glauser* matter that we previously
 20 discussed." *Id.*, Ex. C. Twilio responded that it needed a formal written discovery request. *Id.*;
 21 Hawk Decl., ¶ 29, Ex. H.

22 After Twilio declined to respond to informal requests for information (because it never
 23 agreed to do so), Plaintiff's counsel said he would serve a document subpoena and threatened to
 24 "re-nam[e] Twilio as a defendant in this case." Hawk Decl., ¶ 29, Ex. H.

25 3. Plaintiff's Formal Discovery Requests to Non-Parties

26 Plaintiff did not serve any formal discovery on non-parties until the last day of the
 27 autodialer discovery period. Hawk Decl., ¶ 39. On June 26, 2014, at 8:59 p.m., Plaintiff's
 28 counsel served GroupMe with notices of document subpoenas to Twilio and Bandwidth. Hawk

Decl., ¶ 31, Ex. I. The next day, on June 27, 2014, Plaintiff served separate subpoenas on Twilio and Bandwidth that sought production of nearly identical categories of documents purportedly related to the autodialer issue. *Id.*, ¶ 33. Plaintiff had never before sought any information or documents from Bandwidth. *Id.*, ¶ 39.

Plaintiff's subpoenas set July 11, 2014, as the deadline to respond. Hawk Decl., ¶ 31. On July 8, 2014, Twilio and Bandwidth served responses, which objected on, among other grounds, that the subpoenas were untimely pursuant to the autodialer discovery deadline in the Court's scheduling order. *Id.*, ¶ 35. The untimely subpoenas served on Twilio and Bandwidth constituted Plaintiff's only attempt to conduct formal discovery of non-parties. *Id.*, ¶ 39; Hazzard Decl., ¶ 8.

Plaintiff never asked Twilio or Bandwidth to meet and confer regarding their respective responses to the subpoenas. Hawk Decl., ¶¶ 35, 39. Plaintiff never filed a motion to compel further responses from Twilio or Bandwidth. Plaintiff never moved to modify the scheduling order to extend the deadline of June 27, 2014, to complete autodialer discovery. Plaintiff also never sought to depose Twilio, Bandwidth, or their respective employees, Mr. Badri or Mr. Mello, who submitted declarations in support of GroupMe's MSJ. *Id.*

On July 28, 2014, Plaintiff filed a Rule 56(d) request for a continuance of the briefing schedule, arguing he was "unfairly prejudiced" because Twilio and Bandwidth did not produce documents. Mot. at 12. Plaintiff never discussed his filing with GroupMe. Hawk Decl., ¶ 40. July 28 was Plaintiff's deadline to file his opposition to GroupMe's MSJ, which he did not file.

IV. ARGUMENT

A party seeking an extension of an MSJ briefing schedule under Rule 56(d) has the burden to show: "(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mort. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). The moving party must also show it has "diligently pursued its previous discovery opportunities," and "allowing additional discovery would preclude summary judgment." *Brocade Commc'ns Sys., Inc. v. A10 Networks, Inc.*, 843 F. Supp. 2d 1018, 1026-27 (N.D. Cal. 2012).

Importantly, "Rule 56(d) does not reopen discovery." *See Dumas v. Bangi, M.D.*, 2014

1 WL 3844775, at *at 2 (E.D. Cal. Jan. 23, 2014) (emphasis added). It merely “forestalls ruling on a
 2 motion for summary judgment in cases where discovery is still open and provides the prospect of
 3 defeating summary judgment.” *Id.* Where the discovery period has ended, a party seeking more
 4 discovery to oppose summary judgment must move for a continuance of the briefing schedule
 5 under Rule 56(d) and for modification of the scheduling order under Rule 16(b). *Sullivan v. City*
 6 *of Marysville*, 2014 WL 2896003, at *3-4 (W.D. Wash. June 26, 2014); *see Gofron v. Piscel*
 7 *Technologies, Inc.*, 804 F. Supp. 2d 1030, 1040 (N.D. Cal. 2011).²

8 Here, Plaintiff’s motion asks the Court to grant a continuance under Rule 56(d) so he can
 9 conduct discovery on the autodialer issue as to non-parties Twilio and Bandwidth. Discovery on
 10 the autodialer issue is closed and Plaintiff has not filed a motion to reopen it.

11 Plaintiff also failed to meet his burden necessary to obtain a continuance under Rule
 12 56(d). Plaintiff did not act diligently in conducting discovery, did not identify specific facts he
 13 needs to oppose the MSJ, and did not show those facts would preclude summary judgment
 14 against him. Plaintiff cannot avoid summary judgment and the Court should deny his motion.

15 **A. The Discovery Period On the Autodialer Issue Is Closed**

16 Plaintiff’s request for a Rule 56(d) continuance to conduct discovery hinges on his
 17 contention the autodialer discovery period remains open. Mot. at 12 n.7. Plaintiff is incorrect.

18 Plaintiff twice asked for, and agreed to, a deadline of June 27, 2014, to complete
 19 autodialer discovery. Merryman Decl., ¶¶ 3-4; Order on Briefing Sched., Dkt. No. 109, at 3
 20 (“Deadline to complete discovery on the autodialer issue raised in GroupMe’s summary judgment
 21 motion, except as noted in item 3 below: June 27, 2014” (emphasis in original)).³ The Court set
 22 that deadline in its Orders dated March 27 and May 16, 2014. *Id.*; Civ. Mins., Dkt. No. 93 (Mar.

23 ² Plaintiff argues a stay of MSJ briefing is appropriate if the party opposing summary judgment is awaiting responses
 24 to outstanding discovery requests. Mot. at 7 (citing *Morton v. Hall*, 455 F. Supp. 2d 1066, 1079 (C.D. Cal. 2006);
 25 *ASUS Computer Int’l v. Round Rock Research, LLC*, 2013 WL 5545276, at *2 (N.D. Cal. Oct. 8, 2013)). That
 26 principle may apply when the discovery period remains open or a timely motion to compel has been filed, *id.*, but
 Local Rule 37-3, as well as cases cited above, dictate discovery responses due after the discovery cutoff render the
 discovery requests unenforceable. Civil L.R. 37-3. Untimely discovery requests do not warrant Rule 56(d) relief.

27 ³ The only exception to the deadline of June 27, 2014, to complete discovery on the autodialer issue was for
 28 GroupMe “to take [the] deposition of anyone, including experts who submit[] a declaration in support of Glauser’s
 opposition to GroupMe’s summary judgment motion.” Order on Briefing Sched., Dkt. No. 109, at 3.

27, 2014). As recently as June 26, 2014, Plaintiff's counsel acknowledged the Court's deadline of June 27, 2014, to complete autodialer discovery when he requested GroupMe stipulate to an extension of that deadline. Hawk Decl., ¶ 30.

Despite these facts, Plaintiff's motion argues June 27, 2014, was not a discovery cutoff. Mot. at 12 n.7. Plaintiff's conduct belies his argument, and the plain language of the Court's Orders dated March 27 and May 16, 2014, dictates Plaintiff's time to conduct autodialer discovery ended. Those Court Orders provide Plaintiff "up to 60 days" to complete autodialer discovery, and specify June 27, 2014, was the "Deadline to complete discovery on the autodialer issue." Order on Briefing Sched., Dkt. No. 109 at 3 (emphasis in original). Those provisions can only be read as setting an autodialer discovery cutoff of June 27, 2014. *See* Civil L.R. 37-3 (discovery cutoff is "date by which all responses to written discovery are due . . ."); *Crayton v. Rochester Med. Corp.*, 2010 WL 392341, at *2 (E.D. Cal. Jan. 25, 2010) (order "requir[ing] all non-expert discovery be completed" by September 25, 2009 set date as fact discovery cutoff; no merit to argument plaintiff could conduct fact discovery until later date by which "all discovery must be completed").

The discovery period has closed as to formal autodialer discovery, including such discovery sought from Twilio and Bandwidth. *Muench Photography, Inc. v. Pearson Educ., Inc.*, No. 12-cv-01927, Order, Dkt. No. 54 at 1 (N.D. Cal. Aug. 29, 2013) (quashing untimely third party subpoena, noting courts in this district hold "[t]hird-party subpoenas under [Rule] 45 'are subject to the same scheduling orders and deadlines as other forms of discovery'").

B. Plaintiff Did Not Act Diligently In Seeking Autodialer Discovery

To meet his burden on a Rule 56(d) motion, Plaintiff must show he "diligently pursued its previous discovery opportunities." *Gofron*, 804 F. Supp. 2d at 1036 (emphasis in original). As this Court recently noted, the moving party must show it "meaningfully pursue[d]" the discovery it seeks, and explain why the discovery could not have been obtained before the discovery cutoff. *See Henry v. Regents of the Univ. of Cal.*, -- F. Supp. 2d --, 2014 WL 709971, at *6 n.4 (Judge Hamilton) (N.D. Cal. Feb. 24, 2014) (denying Rule 56(d) request). If a party has not been diligent, the inquiry should end and he should not be granted relief under Rule 56(d). *In re Cardtronics ATM Fee Notice Litig.*, 874 F. Supp. 2d 916, 927 (S.D. Cal. 2012).

Courts within this district have denied Rule 56(d) motions, finding parties did not diligently conduct discovery in various circumstances applicable here. Courts in this district have denied Rule 56(d) requests for extensions of time where a plaintiff failed to conduct discovery in the time allotted by stipulated discovery and briefing deadlines on a summary judgment motion, and where a plaintiff failed to serve discovery requests in sufficient time to receive responses by the discovery cutoff. *Hill v. Lincoln Nat'l Life Ins.*, 2013 WL 9447515, at *1-2 (N.D. Cal. Aug. 28, 2013) (failed to conduct discovery before stipulated deadline); *Gofron*, 804 F. Supp. 2d at 1040 (served discovery with responses due after discovery cutoff); *see also In re Cardtronics ATM Fee Notice Litig.*, 874 F. Supp. 2d at 927 (same).

Courts in other districts within this circuit similarly denied Rule 56(d) requests where a plaintiff made a “tactical decision” to forego formal discovery efforts during the discovery period and, instead, to rely solely on “informal discovery,” and where plaintiffs failed to meet and confer or move to compel the production of documents to obtain purportedly essential evidence until after the discovery period ended and after those plaintiffs moved under Rule 56(d). *Clark v. County of Tulare*, 755 F. Supp. 2d 1075, 1100-1101 (E.D. Cal. Nov. 17, 2010) (denying request under Rule 56(f), predecessor to Rule 56(d), after summary judgment granted where plaintiff chose to rely on “informal discovery”); *Henry*, 2014 WL 709971, at *6 n.4; *Thommeny v. Paramount Pictures Corp.*, 2011 WL 2899340, at *2 (C.D. Cal. July 13, 2011) (plaintiff sought to meet and confer after discovery cutoff); *see also Pfingston v. Ronan Engineering Co.*, 284 F.3d 999, 1005 (9th Cir. 2002) (plaintiff failed to meet and confer or move to compel during discovery period or before filing Rule 56(f) request). *Hill* is illustrative.

1. *Hill v. Lincoln Nat'l Life Ins.*

In *Hill*, the parties jointly proposed a briefing schedule for a “relatively early motion for summary judgment on [an] ERISA preemption” issue. *Hill*, 2013 WL 9447515, at *1. The court adopted the briefing schedule in an order dated May 17, 2013, providing plaintiff with approximately three months, until August 27, 2013, to conduct discovery and file an opposition to defendant’s anticipated summary judgment motion. *Id.* Defendant “timely filed its motion for summary judgment” pursuant to the briefing schedule, but, on August 21, 2013, plaintiff filed a

1 Rule 56(d) motion seeking to “extend the briefing schedule and allow [additional time for]
 2 discovery.” *Id.* Plaintiff claimed she needed to serve document requests and take depositions.
 3 *Id.* at *1-2. Defendant opposed the motion. *Id.* at *1.

4 The *Hill* court, in analyzing plaintiff’s Rule 56(d) motion, looked at whether plaintiff
 5 sufficiently explained discovery she conducted during the discovery period and why she could not
 6 obtain discovery she professed to need despite her efforts. *Hill*, 2013 WL 9447515, at *1-2.
 7 Plaintiff in *Hill* failed to show she “attempted to, or did, conduct any discovery during three
 8 months, even though Plaintiff knew that the Court had set a briefing schedule for a motion for
 9 summary judgment on the preemption issue, to which Plaintiff stipulated.” *Id.* Plaintiff could not
 10 justify her lack of diligence by claiming she did not know the identity of witnesses until
 11 defendant filed its summary judgment motion. Plaintiff knew the identity of one witness before
 12 receiving the motion, and was not prevented from conducting written discovery and taking Rule
 13 30(b)(6) depositions of entities she knew were involved. *Id.* at *2. Plaintiff did not act diligently
 14 and the *Hill* court denied her Rule 56(d) motion. *Id.* The same result should apply here.

15 **2. Plaintiff Did Not Act Diligently in Seeking Untimely Discovery from** 16 **Twilio and Bandwidth**

17 The only discovery Plaintiff identifies as the basis for his Rule 56(d) motion are document
 18 subpoenas served on non-parties Twilio and Bandwidth on June 27, 2014, the deadline to
 19 complete autodialer discovery. Mot. at 8. Plaintiff does not carry his burden to show he
 20 diligently pursued that discovery. *Gofron*, 804 F. Supp. 2d at 1036.

21 As of April 28, 2014, at the latest, Plaintiff knew Twilio and Bandwidth’s respective
 22 technologies were involved in routing text messages to his cell phone as part of GroupMe’s free
 23 social messaging service. Compl., Dkt. No. 1 (May 27, 2011); MSJ, Dkt. No. 107-1 (Apr. 28,
 24 2014). Yet, Plaintiff failed to serve formal discovery requests before the autodialer discovery
 25 cutoff of June 27, 2014, on Twilio or Bandwidth, and he served no discovery on the Twilio and
 26 Bandwidth employees who submitted declarations in support of GroupMe’s MSJ. Hawk Decl.,
 27 ¶¶ 35-39; Hazzard Decl., ¶¶ 8-9. These witnesses clearly possessed information relevant to the
 28 autodialer issue as they submitted declarations in support of the MSJ. Yet, Plaintiff’s Rule 56(d)

1 motion does not explain his delay in serving formal discovery on Twilio and Bandwidth.
 2 Plaintiff's motion also does not explain why he waited until June 20, 2014, to request Twilio
 3 informally provide information. Hazzard Decl., ¶¶ 8-9.

4 Plaintiff's service of untimely subpoenas on non-parties without explanation for the delay
 5 is, by itself, evidence of his lack of diligence. *See Gofron*, 804 F. Supp. 2d at 1040 (denying Rule
 6 56(d) motion because plaintiffs missed "discovery deadlines and ignored the Court's orders,"
 7 failed to submit affidavit explaining the missed deadline, and failed to move "for an extension of
 8 the discovery cutoff"). Because Plaintiff served subpoenas on the last day to complete autodialer
 9 discovery and called for responses after the autodialer discovery deadline, his document
 10 subpoenas to Twilio and Bandwidth were untimely, unenforceable, and the antithesis of diligent
 11 discovery efforts. *See id.*; *Engles v. Hilti, Inc.*, No. 11-cv-491, Order, Dkt. No. 33 at 1-2 (N.D.
 12 Okl. Dec. 27, 2012) (quashing untimely third-party subpoena served on the discovery cutoff);
 13 Civil L.R. 37-3 (discovery requests calling for responses after discovery cutoff are unenforceable
 14 except by order of the court for good cause shown). It only exacerbates matters for Plaintiff that
 15 he failed to comply with discovery deadlines he requested. *See Hill*, 2013 WL 9447515, at *1-2.

16 Plaintiff's conduct since the discovery cutoff provides further evidence of his lack of
 17 diligence. Plaintiff complains incorrectly that he received "[il]legitimate" objections to his
 18 subpoenas from Twilio and Bandwidth on July 8, 2014, three days before their deadline to
 19 respond of July 11, 2014. Mot. at 12. Plaintiff did nothing to attempt to resolve those objections.
 20 Hawk Decl., ¶¶ 35-39. Plaintiff failed to meet and confer with Twilio or Bandwidth, failed to file
 21 a motion to compel, and never filed a motion to reopen discovery.⁴ *See Henry*, 2014 WL 709971,
 22 at *6 n.4. Indeed, Plaintiff also failed to file his Rule 56(d) motion until his deadline to oppose
 23 GroupMe's MSJ, although Plaintiff knew as of July 8, 2014 (almost three weeks earlier), that
 24 Twilio and Bandwidth served objections to the document subpoenas.

25 Plaintiff did not even act diligently in his efforts to obtain an extension of the discovery

26 ⁴ Plaintiff's motion states he "intends to serve a written request for Twilio and Bandwidth to supplement their
 27 subpoena responses no later than Tuesday, August 5, 2014," and, if they refuse, "file a motion seeking an order
 28 compelling them to do so no later than August 12, 2014." Plaintiff has not sent any written request, and motions to
 compel discovery cannot be filed more than 7 days after the discovery cutoff. Civil L.R. 37-3; Hawk Decl., ¶¶ 35, 39.

1 cutoff. On June 27, 2014, after GroupMe declined to stipulate to a four-week extension of the
2 autodialer discovery deadline, which Plaintiff sought at the eleventh hour, he asked whether
3 GroupMe would agree to a shorter extension. Hawk Decl., ¶¶ 32, 34, Ex. J. GroupMe asked
4 Plaintiff for a proposal, but Plaintiff never responded. *Id.*

5 Plaintiff, without explaining the foregoing delays, attempts to paint a picture of diligence,
6 arguing Twilio “renege[d] on its agreement to produce information informally,” and GroupMe’s
7 attorneys “thwarted” third-party discovery efforts. Mot. at 4-5, 11. These arguments lack merit.

8 Twilio never agreed to produce any documents to Plaintiff informally. Hazzard Decl., ¶ 6.
9 Twilio never waived its right to be served properly with a subpoena or to serve written responses,
10 including objections. *Id.* The discussions between Plaintiff’s counsel and Twilio on April 21,
11 2014, confirmed as much. *Id.*, ¶ 4. Twilio never received an actual request from Plaintiff to
12 produce information informally until June 20, 2014, one week before the autodialer discovery
13 cutoff. *Id.*, ¶¶ 8-9; Mot. at 5. Plaintiff’s argument about a purported “agreement” with Twilio
14 attempts to distract the Court from Plaintiff’s delay of over two months, from April 18, 2014,
15 until June 20, 2014, to request informally information from Twilio. Plaintiff, by his own
16 admission, chose to seek informal discovery from Twilio and to wait until the end of the
17 discovery period to ask for it. Plaintiff did not act diligently as required under Rule 56(d). *See*
18 *Clark*, 755 F. Supp. 2d at 1100-1101; *see also Cornwell*, 755 F.3d at 1026-27.

19 Finally, Plaintiff accuses GroupMe’s counsel of “thwart[ing]” his discovery efforts by
20 “advi[sing]” Twilio and Bandwidth to “refuse compliance with their obligations to respond in
21 good faith” to Plaintiff’s document subpoenas. Mot. at 11-12. Plaintiff’s accusations lack merit.
22 Twilio and Bandwidth did not “refuse to respond” to Plaintiff’s document subpoenas. Hawk
23 Decl., ¶ 35. Rather, they served valid objections on the basis, among other grounds, that
24 Plaintiff’s document subpoenas were untimely and unenforceable. *Id.*

25 Plaintiff’s authorities are inapposite; neither GroupMe nor its counsel usurped the Court’s
26 authority, disobeyed a court order, or failed to locate responsive documents during the discovery
27 period by representing Twilio and Bandwidth in asserting valid objections to Plaintiff’s untimely
28 subpoenas. *Price v. TransUnion LLC*, 847 F. Supp. 2d 788, 794 (E.D. Pa. 2012) (by advising

1 third parties to not respond to subpoenas issued by defense counsel, plaintiff's attorney usurped
 2 court's authority to determine whether subpoenas were enforceable); *Fox Industries, Inc. v.*
 3 *Gurovich*, 2006 WL 2882580, at *8 (E.D.N.Y. Oct. 6, 2006) (same, where defense counsel
 4 advised third parties to not respond); *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 135
 5 (2d Cir. 1998) (failed to locate relevant documents requested during discovery); *Adams v.*
 6 *AllianceOne, Inc.*, 2011 WL 2066617, at *3-4 (S.D. Cal. May 25, 2011) (disobeyed court order).

7 All Plaintiff did to conduct discovery on the autodialer issue before the June 27, 2014
 8 autodialer discovery cutoff, was request GroupMe respond further to discovery requests he served
 9 in December 2011. Hawk Decl., ¶ 8. Plaintiff did not contact GroupMe to discuss discovery and
 10 briefing issues until May 5, 2014. *Id.*, ¶ 5. Plaintiff did not act diligently in providing comments
 11 on the draft protective order. *Id.*, ¶¶ 19, 22-24. Plaintiff did not take a single deposition. *Id.*, ¶¶
 12 38-39. Plaintiff did not express displeasure with the substance or timing of GroupMe's expedited
 13 discovery responses or document productions. *Id.*, ¶ 37.

14 To the extent Plaintiff blames GroupMe for Plaintiff's own discovery delays, he cannot
 15 support that position. At Plaintiff's request, GroupMe agreed to, and did, provide discovery
 16 responses fifteen days after Plaintiff served its autodialer discovery requests, and did start
 17 producing autodialer documents eighteen days after Plaintiff served those discovery requests.
 18 Hawk Decl., ¶¶ 19, 20-22, 27-32, 37. Any delay in Plaintiff's receipt of documents resulted from
 19 his attorneys' lack of diligence in providing comments on the draft protective order. *Id.*
 20 GroupMe started producing confidential autodialer documents to Plaintiff the same day the Court
 21 entered the protective order. *Id.* GroupMe completed its autodialer document production by the
 22 autodialer discovery cutoff on June 27, 2014, and produced GroupMe's source code, system and
 23 database architecture, and agreements with Twilio and Bandwidth days earlier. *Id.*

24 Plaintiff has failed to establish he acted diligently as required under Rule 56(d).

25 **C. Plaintiff Fails to Identify Specific Facts that Would Preclude Summary**
 26 **Judgment**

27 To prevail on a Rule 56(d) request, the party seeking the extension must "identify specific
 28 facts they seek in discovery that would preclude summary judgment." *Gofron*, 804 F. Supp. 2d at

1 1039. “Broad statements” or statements evidencing a “mere hope that further evidence may
2 develop . . . [are] an insufficient basis for a continuance.” *Id.* at 1036; *1-800-BAR NONE v.*
3 *Brandow’s Fairway Chrysler Jeep*, 2007 WL 39372, at *9-10 (N.D. Cal. Jan. 4, 2007).

4 *Brocade* is illustrative. There, plaintiff moved for summary judgment on defendant’s
5 counterclaim, alleging plaintiff’s products infringed one of defendant’s patents by performing the
6 same functions as the patents, *i.e.*, “practic[ing] either virtual channel connections or a series of
7 control messages.” *Brocade Commc’ns Sys., Inc.*, 843 F. Supp. 2d at 1026. Rather than oppose
8 plaintiff’s summary judgment motion, defendant moved under Rule 56(d) for more time to
9 conduct discovery on whether plaintiff’s products, among other issues, “perform functions other
10 than the IEEE 802.11 communications protocol.” *Id.* at 1027.

11 Defendant’s Rule 56(d) motion did not identify specific facts in existence that would
12 preclude summary judgment. *Id.* at 1027. Defendant’s motion merely argued factual issues may
13 exist, including whether plaintiff’s “accused products may perform functions other than IEEE
14 802.11 communications protocol.” *Id.* (emphasis added). Defendant did not submit evidence to
15 support its contentions, and failed to identify specific facts suggesting plaintiff’s products, in fact,
16 performed infringing functions. *Id.* (defendant argued for discovery into “technical
17 specifications, features, architecture, coding”). Defendant’s identification of key issues without
18 more was “hardly the ‘specific identification of relevant information’ that would merit relief
19 under Rule 56(d).” *Id.* The court denied defendant’s Rule 56(d) request. *Id.*

20 Here, as in *Brocade*, the parties dispute whether technology used to route text messages to
21 Plaintiff’s cell phone can perform certain functions. MSJ at 3. GroupMe submitted evidence in
22 support of its MSJ showing the technologies, including those provided by Twilio and Bandwidth,
23 lack the ability to perform the requisite functions. *Id.* at 3-9. Plaintiff has failed to provide the
24 Court any evidence to the contrary.

25 Plaintiff’s motion merely identifies broad categories of purportedly relevant discovery
26 requests untimely served on Twilio and Bandwidth. Mot. at 8-9. It is clear Plaintiff wants to find
27 through discovery, among other information, the types of hardware and software Twilio and
28 Bandwidth used, the coded commands deployed to route text messages to Plaintiff’s cell phone,

1 and review Twilio and Bandwidth's source code. *Id.* Plaintiff's motion identifies these
 2 categories without stating (1) whether responsive information exists,⁵ or, more importantly, (2)
 3 whether any facts actually support Plaintiff's claims.

4 The breadth of information Plaintiff identifies as potentially "relevant" and his failure to
 5 identify specific facts, as required by Rule 56(d), demonstrate he does not know whether further
 6 discovery would establish whether GroupMe used an autodialer. Mot. at 8-9. Plaintiff provides
 7 the Court with nothing more than an untimely discovery plan as to where he would look in the
 8 hope of finding support for his position. Under Rule 56(d), this is insufficient.

9 **D. Plaintiff's Proposed Discovery Efforts Would Be Futile**

10 To prevail on a Rule 56(d) motion, the moving party must show that allowing discovery
 11 would preclude summary judgment. *Brocade Commc'ns Sys.*, 843 F. Supp. 2d at 1027. Plaintiff
 12 must demonstrate the "facts" he identifies in his motion will create a material issue of fact as to
 13 whether GroupMe used an autodialer. *See id.* Plaintiff has not met this burden.

14 **1. The Technology Used to Route Text Messages to Plaintiff's Cell Phone**
 15 **Cannot Randomly or Sequentially Generate Phone Numbers**

16 As shown GroupMe's MSJ, the plain terms of the TCPA and FCC's implementing
 17 regulations define "autodialer" as "equipment which has the capacity -- (A) to store or produce
 18 numbers to be called, using a random or sequential number generator" MSJ at 10-13; 47
 19 C.F.R. 64.1200(f)(2) (emphasis added). The most recent district court opinion from the Ninth
 20 Circuit interpreting "autodialer," and recent district court opinions from the Third and Eleventh
 21 Circuits, hold equipment is an autodialer if it has the present capacity to either (a) autonomously
 22 generate "random sequences" of ten-digit phone numbers, or (b) autonomously generate
 23 sequential sets of ten-digit phone numbers. MSJ at 11-13 (citing *Gragg v. Orange Cab Co., Inc.*,
 24 2014 WL 494862, at *2 (W.D. Wash. Feb. 7, 2014), *Gragg v. Orange Cab Co., Inc.*, 2014 U.S.

25 ⁵ Plaintiff also must establish the facts he seeks exist and are in the possession, custody or control of Twilio and
 26 Bandwidth. *Brocade Commc'ns Sys.*, 843 F. Supp. 2d at 1026. Plaintiff fails to meet this burden. Plaintiff merely
 27 opines Twilio and Bandwidth have information describing their technologies, not that Twilio and Bandwidth have
 28 information supporting Plaintiff's opposition to GroupMe's MSJ. Mot. at 10-14. Further, Plaintiff leaps to the
 unwarranted inference that Bandwidth has information he wants because Bandwidth placed a called to Plaintiff's
 counsel upon receiving the document subpoena. *Id.*

1 Dist. LEXIS 29052, at *4-6 (W.D. Wash. Feb. 28, 2014), *Dominguez v. Yahoo!, Inc.*, 2014 WL
2 1096051, at *5-6 (E.D. Pa. Mar. 20, 2014), and *Hunt v. 21st Mort. Corp.*, 2013 WL 5230061, at
3 *3-4 (N.D. Ala. Sept. 17, 2013)); *De Los Santos v. Millward Brown, Inc.*, 2014 WL 2938605, at
4 *6 (S.D. Fla. June 30, 2014) (collecting cases in finding “capacity” means “present capacity”).

5 Of particular importance, the *Gragg*, *Dominguez* and *Hunt* courts, in reaching their
6 conclusions, rejected arguments advanced by plaintiffs for a broader interpretation of “capacity”
7 to include “potential capacity.” *Id.* Those courts reasoned “in today’s world, the possibilities of
8 modification and alternation are virtually limitless.” Mot. at 13 (citing, *e.g.*, *Hunt*, 2013 WL
9 5230061, at *4). Construing the term “capacity” to mean “potential capacity” could improperly
10 include within the TCPA’s regulatory scheme software lacking the actual ability to randomly or
11 sequentially generate phone numbers at present, but that could be altered or reprogrammed in the
12 future as most modern computing systems and cell phones can be reprogrammed. *Id.*

13 GroupMe’s MSJ shows the definition of “autodialer” adopted in *Gragg*, *Dominguez* and
14 *Hunt* is proper. MSJ at 13-14. GroupMe submitted ample evidence in support of its MSJ,
15 including declarations from Twilio and Bandwidth, showing the software applications GroupMe,
16 Twilio and Bandwidth used to route text messages to Plaintiff’s cell phone cannot, and never
17 have been able to, randomly or sequentially generate phone numbers. *Id.* GroupMe’s evidence
18 also shows rewriting those software applications to enable them to randomly or sequentially
19 generate numbers would constitute substantial modifications and alter the core functions of the
20 respective technologies of GroupMe, Twilio and Bandwidth. *Id.*

21 Plaintiff failed to submit any evidence disputing these facts. Plaintiff also failed to submit
22 evidence indicating he can, through discovery, dispute GroupMe’s showings. Indeed, no such
23 evidence exists and any further discovery on the autodialer issue would be futile because GroupMe
24 did not use an autodialer as the TCPA defines that term. Plaintiff tries to escape this conclusion
25 and distract from his lack of evidence by disagreeing with the interpretation of “autodialer” set
26 forth in the TCPA and adopted in *Gragg*, *Dominguez* and *Hunt*.

27 Plaintiff’s proposes two alternative interpretations, but they lack merit. The autodialer
28 analysis ends if equipment lacks the present capacity to randomly or sequentially generate

1 numbers. The uncontroverted evidence shows GroupMe's technology lacks that capacity.

2 **2. Plaintiff's Interpretations of "Autodialer" Lack Merit**

3 Plaintiff argues GroupMe may have used an autodialer because the software applications
4 used to route Plaintiff text messages could be reprogrammed to enable random or sequential
5 number generation. *See* Mot. at 8. This is the same argument for interpreting "capacity" to mean
6 "potential capacity" rejected in *Gragg, Dominguez, Hunt and Millward*. Plaintiff fails to cite any
7 authority supporting his definition of "capacity,"⁶ and *Gragg, Dominguez, Hunt and Millward*
8 demonstrate his proposed definition is untenable. Mot. at 11-13 n.2 (citations omitted); *see also*
9 *Millward Brown, Inc.*, 2014 WL 2938605, at *6. Discovery into the "potential capacity" of
10 GroupMe's technology would be irrelevant under the TCPA, and, thus, futile.

11 Plaintiff, seeking an alternate definition of "autodialer" that does not require the ability to
12 randomly or sequentially generate phone numbers, also argues incorrectly GroupMe may have
13 used an autodialer if its technology constitutes a "predictive dialer." Mot. at 8. According to
14 Plaintiff, a "predictive dialer" is equipment that, without more, "dials numbers from a stored list."
15 *Id.* Plaintiff's unsupported argument that GroupMe may have used a "predictive dialer" that can
16 "dial[] numbers from a stored list" is a moot point. Plaintiff failed to allege GroupMe used any
17 such equipment in his Amended Complaint. MSJ at 16 (citing Am. Compl., ¶ 55).

18 In any event, Plaintiff's reliance on FCC rulings to advance his "predictive dialer" /
19 "autodialer" definition is misplaced. The FCC never eliminated the requirement that, to be an
20 autodialer, equipment must have the capacity to randomly or sequentially generate phone
21 numbers. To be an autodialer, even equipment that "dials numbers from a stored list" must still
22 have a random or sequential number generation functionality.

23 a. FCC Rulings Require an Autodialer Have the Present Capacity to 24 Randomly or Sequentially Generate Phone Numbers

25 Plaintiff argues the FCC adopted an alternative definition of "autodialer" for "predictive
26 dialers" that does not include the "random or sequential number generator" requirement. Mot. at

27 _____
28 ⁶ Plaintiff cites *Sterk v. Path, Inc.*, 2014 WL 2443785, at *3 (N.D. Ill. May 30, 2014), but *Sterk*, discussed herein,
never addresses the "potential capacity" argument.

1 8. The FCC did no such thing.

2 The FCC has since 1992 included in its regulations implementing the TCPA the random
3 or sequential number generation requirement found in the statute. *See* 47 C.F.R. 64.1200(f)(2).
4 The FCC's regulations do not mention, and never have mentioned, an alternative "autodialer"
5 definition that relies solely on a piece of equipment's ability to dial numbers from a list.

6 As recently as November 29, 2012, the FCC reiterated that, to be an autodialer, equipment
7 must have the capacity to randomly or sequentially generate phone numbers:

8 [u]nder the TCPA, the term 'automatic telephone dialing system' or
9 'autodialer' is defined as 'equipment which has the capacity to –
10 (A) store or produce telephone numbers to be called, using a
11 random or sequential number generator; and (B) to dial such
12 numbers. *Id.* § 227(a)(1). The Commission has emphasized that
13 this definition covers any equipment that has the specified capacity
14 to generate numbers and dial them without human intervention
15 regardless of whether the numbers called are randomly or
16 sequentially generated or come from calling lists. . . .

17 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,*
18 *Declaratory Ruling*, 27 FCC Rcd. 15391, 15391, ¶ 2 n.5 (Nov. 29, 2012) (emphasis added)
19 ("2012 Ruling"). Plaintiff's proposed definition of autodialer is incompatible with the FCC's
20 statement -- an autodialer "has the specified capacity to generate numbers and dial . . . regardless
21 of whether the numbers . . . come from calling lists. . . ." *Id.* (emphasis added). The plain
22 language of the FCC's ruling on November 29, 2012, confirms GroupMe's position -- only
23 equipment that "has" (present tense) the "capacity to generate numbers" is an autodialer. *Id.*

24 Plaintiff's argument as to the type of equipment that can constitute an autodialer stems
25 from his misreading of FCC rulings on "predictive dialers," all of which the FCC issued before its
26 statement above on November 29, 2012. *See, e.g., In re Rules and Regulations Implementing the*
27 *Telephone Consumer Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14091 ¶¶ 131-133 (July
28 3, 2003) ("2003 Report and Order"). According to the FCC, a "predictive dialer" is "equipment
that dials numbers and, when certain computer software is attached, also assists telemarketers in
predicting when a sales agent will be available to take calls." *Id.*, ¶ 131. In 2003, the FCC ruled
predictive dialers could constitute autodialers even though predictive dialers place calls to phone

1 numbers on a pre-set list, rather than having the equipment randomly or sequentially generate
 2 them. *Id.*, ¶¶ 131-133. The FCC never indicated it was eliminating the statutory requirement that
 3 an autodialer “us[e] a random or sequential number generator.” 47 U.S.C. § 227(a) (emphasis
 4 added). The FCC merely ruled a certain piece of equipment could be an autodialer without
 5 actually randomly or sequentially generating numbers it dialed.

6 In any event, the FCC’s predictive dialer rulings do not apply to this case. They do not
 7 apply to text messaging technology on their face or by extension. As shown in GroupMe’s MSJ,
 8 the FCC rulings discussing predictive dialers focus on live “sales agents” making voice calls to
 9 consumers. The rulings also focus on the “principal feature of predictive dialing software being a
 10 timing function,” wherein predictive dialers “predict” when a consumer will answer the phone so
 11 a “telemarketer will be available to take the call.” 2003 Report and Order, ¶ 131; *In re Rules and*
 12 *Regulations Implementing the Telephone Consumer Act of 1991*, Report and Order, 27 FCC Rcd
 13 1830, 1834 ¶ 12 n.31 (Feb. 15, 2012) (“2012 Report and Order”). The FCC rulings on their face
 14 discuss only voice calls and circumstances unique to making voice calls. *Id.* They do not discuss
 15 text messages and, as such, do not bind this Court or apply here.

16 Further, the FCC’s rulings on predictive dialers should not be applied to text messages by
 17 extension because the policy issues discussed by the FCC that underlie its predictive dialer rulings
 18 have nothing to do with text messages. In 2002, the FCC undertook to regulate predictive dialers
 19 because the FCC received an increasing number of complaints about predictive dialers initiating
 20 phone calls while sales people were busy speaking with other customers and unavailable, thereby
 21 resulting in some consumers answering phones and hearing “dead air” while they waited for a
 22 salesperson or disconnection. *In re Rules and Regulations Implementing the Telephone Consumer*
 23 *Act of 1991*, Notice of Proposed Rulemaking, 17 FCC Rcd 17459, 17465, 174569, 174575 ¶¶ 7,
 24 15, 26 n.37 (Sept. 18, 2002) (“2002 NPRM”). According to the FCC, these “abandoned calls” left
 25 consumers “feel[ing] harassed or aggravated.” 2003 Report and Order, ¶ 147.

26 Determining consumers needed protection from “abandoned” and “dead air” calls
 27 uniquely caused by predictive dialers, the FCC in 2003 ruled predictive dialers were autodialers
 28 subject to the TCPA’s restrictions. 2002 NPRM, ¶¶ 15, 26; 2003 Report and Order, ¶¶ 131-133.

1 The FCC further created a regulatory scheme within its TCPA rules for predictive dialers that
 2 could only be applicable to voice calls, *i.e.*, implementing rules regulating the frequency with
 3 which predictive dialers can acceptably “abandon calls,” determining a call is “abandoned” if a
 4 salesperson does not engage the consumer within two seconds of the consumer answering his/her
 5 phone, and avoiding “dead air” by playing a prerecorded message for consumers if a salesperson is
 6 unavailable to take the call. 2003 Report and Order, ¶¶ 146-158; 47 C.F.R. 64.1200(a)(7).

7 Text messages do not involve salespersons making voice calls, technology placing calls at
 8 variable rates in an attempt to predict when a salesperson will be available, hang-ups or dead air.
 9 The concerns prevalent with predictive dialers that caused the FCC to regulate predictive dialers
 10 are not present with text messaging, and the FCC’s predictive dialer rulings do not apply here.

11 GroupMe’s uncontroverted evidence shows it lacks the capacity to randomly or
 12 sequentially generate numbers and, therefore, can under no circumstances constitute an autodialer.
 13 There is no point in permitting Plaintiff to conduct discovery as to whether GroupMe’s technology
 14 “dials numbers from a stored list.”

15 b. *Sterk v. Path, Inc.*

16 Plaintiff’s “predictive dialer” argument also relies on an out of circuit decision from the
 17 Northern District of Illinois, *Sterk v. Path, Inc.* Plaintiff’s counsel, Edelson PC, represented
 18 plaintiff in *Sterk*, and made the same arguments in *Sterk* regarding the definition of an autodialer
 19 as Plaintiff makes here. *Sterk*, 2014 WL 2443785, at *2-4. The *Sterk* court agreed with the
 20 Edelson firm’s arguments, but, in doing so, decided that case incorrectly for three reasons: (1) the
 21 court disregarded the requirement an autodialer “us[e] a random or sequential number generator;”
 22 (2) it misapplied FCC rulings on predictive dialers to text messaging technology; and (3) it
 23 ignored the fact that the text messages in *Sterk* were sent in direct response to human commands
 24 to transmit those messages, *i.e.*, “human intervention.” *Id.*

25 First, *Sterk* held unspecified technology provided by Twilio to defendant Path and used by
 26 Path in connection with text messaging activities constituted an autodialer because it “dial[ed]
 27 numbers from a stored list without human intervention.” *Sterk*, 2014 WL 2443785, at *3-4. *Sterk*
 28 read the “random or sequential number generator” requirement out of the TCPA and FCC

1 regulations and, instead, construed it merely as an “alternative basis” for finding equipment is an
 2 autodialer. *Id.* at *4. This interpretation of autodialer is inconsistent with the plain language of
 3 the TCPA, FCC regulations, or FCC rulings, particularly the November 29, 2012 FCC statement
 4 that an autodialer “has the specified capacity to generate numbers and dial . . . regardless of
 5 whether the numbers . . . come from calling lists. . . .” 2012 Ruling, ¶ 2 n.5 (emphasis added).⁷

6 Second, the *Sterk* court admitted it based its decision on FCC rulings discussing the ability
 7 of predictive dialers to “dial[] numbers from a stored list without human intervention.” *Sterk*,
 8 2014 WL 2443785, at *4. The *Sterk* court also acknowledged those FCC rulings may not be
 9 “controlling” in TCPA cases regarding text messaging technology, but applied those rulings,
 10 believing they were “well-reasoned and appropriate to address the well-founded concerns by the
 11 FCC as to the threats posed to public welfare and safety by certain telemarketing practices.” *Id.*
 12 The “concerns by the FCC” underlying its predictive dialer rulings have nothing to do with text
 13 messages. Whether text messaging technology presents the same consumer protection policy
 14 concerns as “abandoned” and “dead air calls” caused by predictive dialers used in phone calls is
 15 best left to the FCC in the first instance. The FCC has not addressed the issue.

16 Finally, *Sterk* held technology in that case sent text messages without “human
 17 intervention.” *Sterk*, 2014 WL 2443785, at *4. The *Sterk* opinion, however, makes no mention
 18 of the fact Path’s technology could only send a text message after a cell phone user “initiated the
 19 transmission” by selecting the phone number to which the message would be sent and clicking a
 20 button to send the message via text. *Id.*; *Sterk v. Path, Inc.*, No. 13-cv-02230, Path’s MSJ, Dkt.
 21 No. 75 at 3-4 (Jan. 31, 2014). The *Sterk* court did not explain how user interaction with the
 22 technology failed to constitute human intervention. *Sterk* conflicts directly with *Gragg* on this.

23 Importantly, as in *Gragg*, GroupMe’s technology only routes text messages to users of
 24 GroupMe’s free social messaging service in response to actions taken by other users. MSJ at 17-
 25 18. Plaintiff provides no evidence to the contrary. Even to the extent the FCC’s predictive dialer
 26

27 ⁷ *Sterk* construed the November 29, 2012 FCC statement as supporting its conclusion that “random or sequential
 28 number generation” is an “alternative basis” for finding equipment constitutes an autodialer. *Sterk*’s reading conflicts
 directly with the plain language of the FCC’s statement. *Sterk*, 2014 WL 2443785, at *3-4; 2012 Ruling, ¶ 2 n.5.

1 rulings could apply, GroupMe's need for "human intervention" to route any text messages
 2 dictates that its technology is not an autodialer. *Gragg*, 2014 WL 494862, at *3-4.

3 Notably, Plaintiff states he will, based on *Sterk*, "request that the Court make the inference
 4 that Twilio's platform – which was previously found to constitute an ATDS (when combined with
 5 equipment similar to GroupMe's) – constitutes an ATDS in this case." Mot. at 10 n.6. *Sterk* is an
 6 entirely different case, is outside the Ninth Circuit, conflicts with several other court decisions
 7 including *Gragg* from this Circuit, and there is no evidence (1) technology Twilio provided Path is
 8 the same technology Twilio provided GroupMe, or (2) Path's technology is similar to GroupMe's.
 9 The protective order entered in *Sterk* prevented parties in that case from publicly filing certain
 10 documents and discovery responses describing the technology at issue. *See Sterk v. Path, Inc.*, No.
 11 13-cv-02230, Protective Order, Dkt. No. 51 (Nov. 6, 2013). Any request for an adverse inference
 12 based on heavily redacted public briefs filed in *Sterk* would be inappropriate.

13 Moreover, Twilio was served with a document subpoena in *Sterk*, but served only
 14 objections on the Edelson firm and did not produce documents. Hazzard Decl., ¶ 10. It is unclear
 15 what information Plaintiff seeks here from Twilio that would justify an adverse inference.

16 **V. CONCLUSION**

17 Plaintiff is not entitled to any relief, especially after failing to send meet and confer letters
 18 to Twilio and Bandwidth by August 5, 2014, as his Motion said he would do. This, in particular,
 19 demonstrates Plaintiff does not need additional discovery, and he used the Twilio and Bandwidth
 20 subpoenas as a pretext to seek more time. GroupMe respectfully requests the Court deny Plaintiff's
 21 Rule 56(d) motion. If the Court is inclined to grant Plaintiff relief, however, it should be limited to
 22 the Twilio and Bandwidth document subpoenas. Plaintiff purports to have no other "outstanding"
 23 discovery, and made no effort to take depositions; discovery should not be reopened entirely.

24 Dated: August 11, 2014

WHITE & CASE LLP

25 By: /s/ Bryan A. Merryman
 26 Bryan A. Merryman

27 Attorneys for Defendant
 28 GROUPME, INC.